

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 8, 2009 appellant, then a 42-year-old firefighter, filed a recurrence of disability claim on June 14, 2009 causally related to a July 31, 2008 employment injury. He asserted that his left knee condition worsened as a result of his work duties. OWCP adjudicated the claim as an occupational disease and accepted the claim for a left knee sprain and a tear of the left medial meniscus.

Appellant filed a claim for compensation for intermittent wage loss from August 17 to 28, 2009. The employing establishment advised that he was a GS-8, step 8. On September 8, 2009 appellant filed a claim for compensation for total disability from September 27 to October 10, 2009. The employing establishment provided his salary as a GS-8, step 5. In a memorandum of a telephone conference dated September 11, 2009, OWCP confirmed that appellant was a GS-8, step 5 earning \$15.25 per hour in pay with a 25 percent cost-of-living adjustment and an overtime rate of \$22.88 per hour. It advised him that it had clarified and corrected his pay rate. OWCP provided appellant with a copy of its pay rate calculation sheets showing a weekly pay rate of \$1,172.71. It determined his weekly pay rate by using the formula applicable to calculating the pay for firefighters. Payment worksheets show that OWCP paid him compensation from August 17, 2009 to January 1, 2010 for intermittent hours lost from work based on a pay rate of \$1,172.71. It paid appellant compensation of \$769.59 from August 17 to 21, 2009, \$2,462.69 from August 30 to September 12, 2009, \$3,166.32 from September 13 to 26, 2009, \$3,007.45 from September 27 to October 10, 2009, \$1,577.60 from October 11 to 23, 2009 and an additional \$879.53 from October 11 to 23, 2009. From October 23, 2009 to January 1, 2010, OWCP paid him gross compensation payments in the amount of \$3,166.32 each compensation period.

On October 30, 2009 OWCP informed appellant by telephone that his pay rate was incorrect.<sup>2</sup> On November 3, 2009 it advised him that it would process payments using the incorrect rate so that his payments would not be delayed. On December 16, 2009 OWCP notified appellant that it was working on correcting his pay rate and that it was paying him “at the same rate we had been using, so that when we calculate the correct pay rate we will be able to make one correction for the entire period.”

In a pay rate worksheet dated January 8, 2010, OWCP calculated that appellant earned \$1,517.20 per week as a firefighter, including base pay, extra firefighter pay and a cost-of-living adjustment. Appellant worked 144 hours biweekly, which included 106 regular hours and 38 overtime hours. OWCP applied the pay rate calculation applicable to firefighters by dividing his annual salary by \$2,756.00 (\$42,019.00 divided by \$2,756.00) to find a hourly rate of \$15.25. It multiplied the hourly rate by 106 which yielded a biweekly base pay of \$1,616.50. OWCP then multiplied his hourly rate by 1.5 to find his overtime rate of \$22.88 per hour. It multiplied appellant’s overtime rate by his overtime hours to find extra pay of \$869.44. OWCP added his

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<sup>2</sup> On October 26, 2009 appellant telephoned OWCP to inquire whether it had underpaid him for the previous two weeks. OWCP noted that it had “mistakenly keyed most recent payment based on number of days instead of hours (144)” and informed him that it would process his extra compensation owed.

base pay and his overtime pay and divided by two, which yielded a weekly pay rate of \$1,242.97 per week. It added a cost-of-living adjustment of \$274.32 to find a total pay rate of \$1,517.29.

On June 22, 2010 OWCP informed appellant of its preliminary determination that he received an overpayment of \$7,541.21 because it paid him compensation based on an incorrect pay rate. It had based his compensation payments on a workweek of 40 rather than 72 hours. OWCP calculated that it should have paid him \$20,368.26 using a pay rate of \$1,517.29 weekly, or \$1,137.97 weekly after applying the dependent compensation rate of three fourths. Instead, it paid him \$27,909.47 using a pay rate of \$1,172.71 weekly or \$879.53 after applying the dependent compensation rate of three fourths and processed this pay rate using a 40-hour week instead of 144 hours biweekly. OWCP subtracted \$20,368.26 from \$27,909.47 to find an overpayment of \$7,541.21. It further advised appellant of its preliminary determination that he was at fault in the creation of the overpayment. OWCP found that he should have been aware that his compensation payments were greater than those he received working. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

By letter dated July 16, 2010, OWCP acknowledged appellant's request for an extension of time to respond to the preliminary overpayment determination. It allowed him until August 6, 2010 to respond to its June 22, 2010 letter.

On August 3, 2010 appellant submitted an overpayment recovery questionnaire and requested a precoupment hearing. He maintained that OWCP assured him that his pay was "clarified and corrected" in a letter regarding the September 11, 2009 memorandum of conference. Appellant asserted that he received varying amounts of compensation. He argued that he had no idea how the pay system worked and expected OWCP to understand his pay rate.

By decision dated October 4, 2010, OWCP denied appellant's request for a precoupment hearing as untimely.

In a decision dated December 2, 2010, OWCP found that appellant received an overpayment of \$7,541.21 because he was paid at an inaccurate pay rate. It further determined that he was at fault in creating the overpayment. OWCP found that he should have known that his compensation was incorrect as his gross compensation payments exceeded the amount he received as salary from the employing establishment. It advised appellant to send in a check for the full amount to repay the overpayment.

On appeal appellant asserts that OWCP provided him an extension to respond to the preliminary notice of overpayment and failed to advise him that the extension would not apply to his request for a precoupment hearing. He further maintained that OWCP assured him that his pay was correct and that he did not realize that he was overpaid. Appellant notes that the amount of compensation that he received varied.

### **LEGAL PRECEDENT -- ISSUE 1**

OWCP regulations on the recovery of overpayments provide that before collecting the overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fault and the right to request waiver of the overpayment.<sup>3</sup> The regulations further provide that a claimant may request a prerecoupment hearing with respect to an overpayment.<sup>4</sup> Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.<sup>5</sup> The only right to a review of a final overpayment decision is to the Board.<sup>6</sup> The hearing provisions of 5 U.S.C. § 8124(b) do not apply to a final overpayment decision.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in a letter dated June 22, 2010. It informed him that he could request a telephone conference, a prerecoupment hearing or a final decision based on the written evidence within 30 days of the date of the letter. Appellant requested a prerecoupment hearing by letter dated August 3, 2010. As his request was postmarked more than 30 days after OWCP's notification of overpayment, it was untimely. Thus, under the regulations appellant waived his right to a prerecoupment hearing.<sup>8</sup> Accordingly, OWCP properly denied his request for a prerecoupment hearing.

On appeal appellant argues that OWCP granted him an extra time to respond to its preliminary determination of overpayment and did not inform him that the extra time did not apply to a hearing request. He thus contends that his request for a prerecoupment hearing should be considered timely. OWCP's regulation, however, does not make any provisions for extending the time to request a hearing beyond 30 days.<sup>9</sup> Further, FECA provides that the hearing provisions of section 8124(b) (5 U.S.C. § 8124(b)) do not apply to a final overpayment decision.<sup>10</sup> Neither OWCP nor the Board may enlarge or modify the terms of FECA.<sup>11</sup>

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<sup>3</sup> 20 C.F.R. § 10.431.

<sup>4</sup> *Id.* at § 10.432.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at § 10.440(b).

<sup>7</sup> *Id.*; *see also Philip G. Feland*, 48 ECAB 485 (1997).

<sup>8</sup> *Id.*

<sup>9</sup> 20 C.F.R. § 10.432.

<sup>10</sup> *Id.* at § 10.440(b); *see also Philip G. Feland*, *supra* note 7.

<sup>11</sup> *See Sammy L. High*, 55 ECAB 697 (2004).

## **LEGAL PRECEDENT -- ISSUE 2**

Under the Federal Firefighters Overtime Pay Reform Act of 1998, in determining the rate of pay for firefighters with regular tours of duty which generally consists of 24-hour shifts, pay rate for compensation purposes is determined as follows:

“(a) Annual salary/-2756 (53 hours of regular pay per week x 52 weeks) = firefighter hourly rate.

“(b) Firefighter hourly rate x 106 hours = biweekly base pay.

“(c) Firefighter hourly rate x 1.5 = firefighter overtime rate.

“(d) Firefighter overtime rate x number of hours in regular tour in excess of 106 hours = biweekly firefighter overtime.

“(e) Biweekly base pay + biweekly firefighter overtime/2 = weekly pay rate.

“Most 24-hour shift firefighters have a regular biweekly tour of 144 hours (six 24 hours shifts) consisting of 106 regular hours and 38 firefighter overtime hours; thus 38 hours (144-106) would be used in step (d) above.”

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>12</sup> Section 8129 of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”<sup>13</sup>

## **ANALYSIS -- ISSUE 2**

OWCP initially calculated appellant's rate of pay using the pay rate per week as \$1,172.71. It determinate his hourly rate using a 40-hour workweek, which yielded an hourly pay rate of approximately \$21.98. OWCP paid him compensation from August 17, 2009 to January 1, 2010 of \$27,909.47 using an hourly rate of \$21.98.

OWCP determined that appellant had received an overpayment of compensation as it calculated his hourly rate using an incorrect number of hours per day. Appellant's pay rate is calculated using the formula for certain firefighters that were included in the Firefighters Overtime Pay Reform Act of 1998, codified at 5 U.S.C. § 5545b. This statute includes firefighters whose normal work schedule, as in effect throughout the year, consists of regular

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<sup>12</sup> 5 U.S.C. § 8102(a).

<sup>13</sup> *Id.* at § 8129(a).

tours of duty which average at least 106 hours per biweekly pay period.<sup>14</sup> Although overtime pay is normally not included in determining pay rate for compensation purposes under section 8114, section 5545(b) was amended to establish that overtime pay for firefighters under that section shall be included in any computation of pay under section 8114.<sup>15</sup> OWCP procedures established a formula for determining pay rate for these firefighters, using a base pay of 106 biweekly work hours, and an overtime rate of 38 hours above the 106 hours.<sup>16</sup> Using this formula, OWCP calculated his weekly pay rate using the pay rate calculation applicable to firefighters. It divided his annual salary by \$2,756.00 (\$42,019.00 divided by \$2,756.00) to find an hourly rate of \$15.25 and multiplied the hour rate of 106 to find a biweekly pay of \$1,616.50. OWCP multiplied appellant's hourly rate by 1.5 to find his overtime rate of \$22.88 per hour for total overtime hours of \$869.44. It added his base pay and his overtime pay and divided by two, which yielded a weekly pay rate was \$1,242.97 per week. OWCP added a cost-of-living adjustment of \$274.32 to find a total pay rate of \$1,517.29, which it adjusted by the three quarters dependent rate to find a weekly pay rate of \$1,137.97. This yielded an hourly rate of approximately \$15.81 as he worked a 72-hour week. OWCP calculated that it should have paid appellant \$20,368.26 using the hourly rate of \$15.81. It subtracted the \$20,368.26 from the amount erroneously paid of \$27,909.47 to find an overpayment of \$7,541.21. Appellant does not dispute the fact or amount of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(b) of FECA<sup>17</sup> provides that “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.” Section 10.433 of OWCP's implementing regulations<sup>18</sup> provide that in determining whether a claimant is at fault, OWCP will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

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<sup>14</sup> *Id.* at § 5545(b).

<sup>15</sup> *Id.* at § 5545b(d)(4).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(d) (April 2002).

<sup>17</sup> 5 U.S.C. § 8129(b).

<sup>18</sup> 20 C.F.R. § 10.433.

### **ANALYSIS -- ISSUE 3**

OWCP found that appellant was at fault in creating the overpayment because he accepted a payment that he knew or should have known was incorrect. It must show that, at the time he received the compensation checks in question, he knew or should have known that the payment was erroneous.<sup>19</sup> The Board finds, however, that OWCP erred in finding appellant at fault in creating the overpayment. OWCP determined that he was at fault because he should have realized that the compensation he received was greater than the wages he had been earning at the time of the employment injury. However, from August 17 to October 23, 2009, appellant received varying amounts of compensation payments ranging from \$769.59 to \$3,166.32. He maintained before OWCP and on appeal that he did not understand the calculation of his pay rate. OWCP bears the burden of proof in showing that a claimant is with fault in the matter of an overpayment of compensation.<sup>20</sup> As appellant received varying amounts of compensation from August 17 to 23, 2009, the Board finds that OWCP did not meet its burden of proof to show that he accepted payments that he knew or should have known were incorrect as they exceeded his compensation from the employing establishment.

On October 30, 2009 OWCP informed appellant that his pay rate was incorrect. Appellant thus was aware that he was accepting inaccurate compensation payments from the end of October 2009 onward. However, OWCP advised appellant to accept the incorrect payments and informed him that it would calculate his entitlement at a later date. In applying tests to determine fault, a reasonable person test applies.<sup>21</sup> It was reasonable for appellant to accept the inaccurate payments based on OWCP's instructions. The Board thus finds that, under the circumstances of the case, he is not at fault in the creation of the overpayment.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for a prerecoupment hearing as untimely and that he received an overpayment of \$7,541.21 from August 17, 2009 to January 1, 2010 because OWCP paid him compensation at an incorrect pay rate. As OWCP improperly found that he was at fault in creating the overpayment, the case is remanded for consideration of waiver of the overpayment.

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<sup>19</sup> See *Robin O. Porter*, 40 ECAB 421 (1989).

<sup>20</sup> See *Janet A. Condon*, 55 ECAB 591 (2004).

<sup>21</sup> See *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 2, 2010 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this opinion of the Board. The October 4, 2010 decision is affirmed.

Issued: November 25, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board